Prestige Dynamics Industries Sdn Bhd v Clariant Masterbatches (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-2083–09 OF 2013
HISHAMUDIN YUNUS, LINTON ALBERT AND BADARIAH SAHAMID JJCA
12 JANUARY 2017

Contract — Breach — Supply of goods — Appellant ordered product known as Masterbatch Renol from respondent — Purchase order stated product must not contained hazardous substance — Respondent supplied products which contained hazardous substances to appellant — Whether in accepting delivery of products from respondent, appellant aware that product contained hazardous substances — Whether respondent contractually obliged to supply products in accordance with terms of purchase order — Whether acceptance of products by appellant constituted waiver of respondent's breach of terms of purchase order — Whether damages proven

The appellant was a supplier of a plastic component named 'Lever' ('the said Lever product') to Robert Bosch Power Tools Sdn Bhd ('Robert Bosch') whereas the respondent was a supplier of a product known as 'Masterbatch Renol' ('the said product') which was incorporated into the appellant's said Lever product. Robert Bosch in turn incorporated the said Lever product into tools produced by it and marketed it in European countries. Vide purchase order dated 7 August 2007 ('the said PO'), the appellant had placed an order for the said product from the respondent. The said PO contained notation that the respondent was required to attach a certificate of analysis ('COA') and test report for hazardous substance with every delivery and that no hazardous substance was allowed in all products and packaging supplied to the appellant. Problem arose when Robert Bosch received a complaint from its European customer that their products were not in compliance with EU Directive 2002/95 EC on the restriction of hazardous substance and claimed compensation amounting to RM3,196,841.71 for costs of re-work, European legal fees and air-freight of tools from the appellant. The appellant claimed that as the said respondent's product contained hazardous substance, this had in turn caused the appellant to supply the appellant's Lever products which were not in compliance with the EU Directive to Robert Bosch. Consequently, in the court below, the appellant filed an action against the respondent claiming the sum of RM3,196,847.71 being the loss and damages suffered as a consequence of the respondent's alleged breach of contract. The trial judge dismissed the appellant's action, hence the present appeal. The issue for consideration was whether in accepting delivery of the said products from the

respondent, the appellant was aware that the said product contained hazardous substance.

Held, allowing the appeal with costs of RM50,000 here and below:

(1) Based on the said PO, it was clear that what the appellant had specifically ordered from the respondent were products that were free of hazardous substance. The further requirement to include a test report for hazardous substance with every delivery underscores the importance of knowledge of specific chemical composition of the said product, to ensure that they do not contain any hazardous substance. The respondent had accepted the said PO with the acknowledgment; hence the respondent was contractually obliged to supply the said product in accordance with the terms in the said PO. The learned judge was clearly in error in shifting the burden on the appellant to insist that the respondent comply with the obligation (see paras 24–26).

(2) It was not disputed that no such test report was supplied to the appellant. Thus, it stood to reason that the appellant was unaware of the specific chemical composition of the said product, including that the said product contains hazardous substance. In the absence of knowledge that the said product supplied by the respondent contained hazardous substance, the appellant's acceptance of the said product could not amount to a waiver of the respondent's breach of the express term in the PO. Further, the appellant had adduced sufficient documentary and oral evidence to prove its damages (see paras 28–29 & 31).

[Bahasa Malaysia summary

Perayu adalah pembekal komponen plastik yang bernama 'Lever' ('barangan Lever') kepada Robert Bosch Power Tools Sdn Bhd ('Robert Bosch') sementara responden adalah pembekal barangan yang dikenali sebagai 'Masterbatch Renol' ('barangan tersebut') yang mana dimasukkan ke dalam barangan Lever perayu tersebut. Robert Bosch sebaliknya memasukkan barangan Lever tersebut ke dalam alat yang dikeluarkannya dan memasarkannya di negeri-negeri Eropah. Melalui pesanan belian bertarikh 7 Ogos 2007 ('PB tersebut'), perayu telah membuat pesanan bagi barangan tersebut daripada the responden. PB tersebut mengandungi notasi bahawa responden dikehendaki melampirkan sijil analisa ('SA') dan laporan ujian bagi bahan berbahaya dengan setiap penghantaran dan bahawa tiada bahan berbahaya dibenarkan di dalam kesemua barangan dan bungkusan yang dibekalkan kepada perayu. Masalah berbangkit apabila Robert Bosch menerima aduan daripada pelanggan Eropahnya bahawa barangan mereka tidak mematuhi Arahan EU 2002/95 EC atas sekatan bahan berbahaya menuntut pampasan sebanyak RM3,196,841.71 bagi kos kerja semula, fi guaman Eropah dan kargo udara alat-alat daripada perayu. Perayu menuntut bahawa memandangkan barangan responden mengandungi bahan berbahaya, ini telah seterusnya menyebabkan

perayu membekalkan barangan Lever perayu yang tidak mematuhi dengan Arahan EU kepada Robert Bosch. Akibatnya, di Mahkamah Tinggi, perayu memfailkan tindakan terhadap responden dengan menuntut jumlah sebanyak RM3,196,847.71 sebagai kerugian dan kerosakan yang dialami akibat dakwaan kemungkiran kontrak oleh responden. Hakim perbicaraan menolak tindakan perayu, maka rayuan ini. Isu untuk pertimbangan adalah sama ada dalam menerima penghantaran barangan tersebut daripada responden, perayu sedar yang barangan tersebut mengandungi bahan berbahaya.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM50,000 di mahkamah ini dan Mahkamah Tinggi:

(1) Berdasarkan atas PB tersebut, adalah jelas bahawa apa yang dipesan secara jelas daripada responden adalah baranagn yang bebas daripada bahan berbahaya. Kehendak selanjutnya adalah untuk memasukkan laporan ujian bagi bahan berbahaya dengan setiap penghantaran menekankan pentingnya pengetahuan mengenai komposisi kimia spesifik barangan tersebut, untuk memastikan yang ia tidak mengandungi apa-apa bahan berbahaya. Responden telah menerima PB tersebut dengan pengakuan; maka responden secara kontraktual bertanggungjawab untuk membekalkan barangan tersebut mengikut syarat-syarat di dalam PB tersebut. Hakim yang bijaksana jelas tersilap dalam menukar beban ke atas perayu untuk mendesak bahawa responden mematuhi tanggungjawab tersebut (lihat perenggan 24–26).

(2) Ia tidak dipertikaikan bahawa tiada laporan ujian sedemikian dibekalkan kepada perayu. Oleh itu adalah munasabah bahawa perayu tidak sedar mengenai komposisi kimia spesifik barangan tersebut, termasuk bahawa barangan tersebut mengandungi bahan berbahaya. Dalam ketiadaan pengetahuan bahawa barangan tersebut yang dibekalkan oleh responden mengandungi bahan berbahaya, penerimaan perayu terhadap barangan tersebut tidak merupakan pengenepian pelanggaran syarat nyata responden di dalam PB tersebut. Selanjutnya, perayu telah mengemukakan keterangan dokumen dan lisan yang mencukupi untuk membuktikan ganti ruginya (lihat perenggan 28–29 & 31).]

Notes

For cases on supply of goods, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3795–3801.

Cases referred to

Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary)) & Ors [2010] 3 MLJ 753, CA (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)

Appeal from: Civil Suit No 22–634 of 2009 (High Court, Pulau Pinang)

Karin Lim (Suppiah with her) (Presgrave & Matthews) for the appellant.
Ng Sai Yeang (Roveena Kaur with her) (Raja, Darryl & Loh) for the defendant.

Badariah Sahamid JCA:

INTRODUCTION

[1] Parties will be referred to as they were in proceedings before the High Court.

[2] This is an appeal against the decision of the learned judicial commissioner ('JC') who dismissed the plaintiff's claim against the defendant for a breach of contract in respect of a product (Masterbatch) sold and supplied to the plaintiff by the defendant.

BACKGROUND FACTS

[3] A summary of the background facts is derived from the learned JC's grounds of judgment, with necessary modifications.

[4] At all material times, the plaintiff was a supplier of a plastic component named 'Lever (Bosch Part No 2609100352)' ('the said Lever product') to Robert Bosch Power Tools Sdn Bhd ('Robert Bosch').

[5] The defendant is a producer and supplier of a product known as Masterbatch Renol PAJ4A741GM Clariant Red ('the said product'). The said product was subsequently incorporated into the plaintiff's said Lever product and was sold and supplied by the plaintiff to Robert Bosch.

[6] Robert Bosch in turn incorporated the said Lever product into tools produced by it and marketed in European countries.

[7] From 2004–2007 the plaintiff had placed numerous orders for the said product from the defendant.

[8] Vide a purchase order ('PO') dated 7 August 2007, the plaintiff had placed an order for the said product from the defendant. The said PO contained the following notation:

> Please attach a COA ('Certificate of Analysis') and Test Report for Hazardous Substance with every delivery.
>
> No hazardous substance is allowed in all products and packaging supplied to PDI.

(Prestige Dynamics Industries Sdn. Bhd.)

[9] The defendant had accepted the said PO and supplied the said product to the plaintiff. Delivery of the said product to the plaintiff was completed on 1 March 2008. In total there were four deliveries. The defendant had included the COA but not the test report with each delivery.

[10] By way of a letter dated 13 March 2008, Robert Bosch informed the plaintiff that it had received a complaint from its European customer that the products produced by Robert Bosch was not in compliance with EU Directive 2002/95 EC on the restriction of hazardous substance ('ROSH') as they contained cadmium of 1800 ppm (parts per million) whereas the permissible limit under the EU Directive was only 100 ppm.

[11] The plaintiff's contention is that because the said product supplied by the defendant to the plaintiff contained hazardous substance, in contravention of the EU Directive and the PO, this had in turn caused the plaintiff to supply the plaintiff's Lever product to Robert Bosch, which products were not in compliance with the EU Directive.

[12] Robert Bosch claimed compensation from the plaintiff for the costs of corrective action taken on the said Lever product supplied to Robert Bosch. After negotiations between the plaintiff and Robert Bosch, the plaintiff claims that it was liable to pay the sum of RM3,196,841.71 to Robert Bosch. The sum abovementioned represents the costs of re-work, European legal fees and air-freight of tools.

[13] Thus, the plaintiff claims, inter alia, the sum of RM3,196,847.71 for loss and damages suffered as a consequence of the defendant's alleged breach of contract.

ISSUES BEFORE THE HIGH COURT

[14] The issues before the High Court may be summarised as follows:

(a) whether the defendant had at any time prior to 21 March 2008, notified the plaintiff that the said product was not Restriction on Hazardous Substance ('RoHS') compliant?

(b) whether the plaintiff can be considered as having accepted the said product, in spite of the absence of the test report in every delivery as stipulated by the PO?

(c) whether the defendant is liable for product liability? and

(d) whether the defendant is liable to the plaintiff for the loss and damage suffered by the plaintiff, in the sum of RM3,196,841.71, which the plaintiff was liable to pay Robert Bosch?

DECISION OF THE HIGH COURT

[15] The learned JC had dismissed the plaintiff's claim on the grounds, summarised as follows.

[16] Even if there was a breach of contract by the defendant, the plaintiff's acceptance of the said products by the plaintiff was construed as a waiver of the breach. The plaintiff had ordered the same said product from the defendant from 2004–2007 and the plaintiff had accepted the said product without any complaint. According to the learned JC:

> ... The deliveries of the said product were affected on 14 October 2007, 5 January 2008 and 1 February 2008 and 1 March 2008. Between the first and last delivery, the plaintiff was accorded reasonable opportunity to inspect or examine the product. In fact after the first delivery the plaintiff had ample time (about a month and a half) to examine the product and to reject the product before the second delivery was made on 5 January 2008. Therefore even if the defendant had breached the contract, the plaintiff had accepted the said product ... To my mind, the plaintiff's conduct amounts to a waiver of the defendant's breach of contract.

[17] The learned JC also made a finding that the plaintiff was aware that the said product supplied by the defendant contained hazardous substances:

> In fact, as I have said earlier, the plaintiff knew the products contained hazardous substance. The plaintiff had actually wanted a product that is ROSH compliant according to the EU Directive. This was never communicated to the defendant by way of the purchase order or letters or any discussion before the orders for the product were made.

[18] In respect of the legal effect of the notation in the PO in respect of the test report, the learned JC was of the view that they were 'new terms' contained in the PO. The learned JC had stated thus:

> The PO of 7 August 2007 carries a *Note* with additional details that is:
>
> 'Please attach COA and Test Report for hazardous substance for every delivery'.
>
> 'Please take note no hazardous substance allowed in all products and packaging supplied to PDI'.
>
> The issue here is whether this additional detail in the note is a general statement or a condition/term that binds the parties.
>
> It is the court's view that the additional details in the note are new terms which were in the purchase order prior to the purchase order dated 7 August 2007. The delivery

of the product should come with the COA (certificate of analysis) and the test report.

[19] However, in spite of finding the requirement of the test report to be a term of the PO, the learned JC held that it was the duty of the plaintiff to insist on the test report before accepting the said products, and by failing to do so, it was construed that, 'the plaintiff had waived the requirement for a test report'.

[20] The learned JC also made a finding that the plaintiff had failed to prove its losses. She stated thus:

> The claims were damages for European legal fees, p P2 rework charges and p P2 rework materials. The supporting documents were all marked ID28. None of the makers of the documents were called to testify ... As for McP rework costs, I find that it is rework for the product IXO 11 Lever and not for product 1XO III Lever Bosch No 2609 100 352 as pleaded by the plaintiff in the statement of claim. As such I find the plaintiff had failed to prove its losses relating to the product IXIIII Lever Bosch No 2609 100 352.

OUR JUDGMENT

[21] After careful consideration of parties 'oral and written submissions, appeal records and relevant authorities, we find merits in the plaintiff's submissions. We therefore unanimously allow this appeal with costs. The decision of the learned JC is set aside. The reasons for our decision follows.

Knowledge of presence of hazardous substance

[22] One of the issues raised before the High Court was whether in accepting delivery of the said products from the defendant, the plaintiff was aware that the said product contains hazardous substance?

[23] We agree with the plaintiff's submission that the material contractual document was the PO dated 7 August 2007, which contained the following terms:

> Please attach a COA ('Certificate of Analysis') and Test Report for Hazardous Substance with every delivery.
>
> No hazardous substance is allowed in all products and packaging supplied to PDI (Prestige Dynamics Industries Sdn Bhd).

[24] It is clear from the above terms that what the plaintiff had specifically ordered from the defendant were products that were free of hazardous substance. The further requirement to include a test report for hazardous

substance with every delivery underscores the importance of knowledge of specific chemical composition of the said product, to ensure that they do not contain any hazardous substance.

[25] The defendant had accepted the PO dated 7 August 2007 with the acknowledgment: 'the undersigned hereby acknowledge and accept this order in term accordance to the condition stipulated above' (p 638 of CB1). Thus the defendant was contractually obliged to supply the said product in accordance with the terms in the PO.

[26] We also agree with the plaintiff's contention that it is the obligation of the defendant to supply the test report in compliance with the terms of the PO. The learned JC was clearly in error in shifting the burden on the plaintiff to insist that the defendant comply with the obligation.

[27] Since the existence of hazardous substance in the said product can only be confirmed by a test report and not a mere visual inspection of the said product ,the learned JC had misdirected herself in finding that 'Between the first and last delivery, the plaintiff was accorded reasonable opportunity to inspect or examine the product. In fact after the first delivery the plaintiff had ample time (about a month and a half) to examine the product and to reject the product before the second delivery was made on 5 January 2008'.

[28] It is not disputed that no such test report was supplied to the plaintiff. Thus, it stands to reason that the plaintiff was unaware of the specific chemical composition of the said product, including that the said product contains hazardous substance. The position would be different had the test report been provided but the plaintiff had nevertheless accepted the delivery of the said product.

[29] In the absence of knowledge that the said product supplied by the defendant contains hazardous substance, the plaintiff's acceptance of the said product cannot amount to a waiver of the defendant's breach of the express term in the PO. Thus, we are minded to agree with the plaintiff that the learned JC had erred in fact and law in construing a waiver in the particular circumstances.

[30] In this respect, established authorities have held that a waiver must be an intentional act with knowledge (*Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary)) & Ors* [2010] 3 MLJ 753 (CA); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374).

Proof of damages

[31] On perusal of the evidence adduced, we are of the opinion that the plaintiff had adduced sufficient documentary and oral evidence to prove its damages. Reference is made to exh P11, which shows the breakdown of the total sum of damages claimed by the plaintiff in the sum of RM3,196, 841.71.

[32] The documents pertaining to rework costs appear as exh 43 (pp 759–766 *R/R Jld* 5). Invoices relating to freight charges appear as exhs P44 and P45 (pp 770–851 and 852–888). Legal fees incurred in European countries is shown in p 767 *RR Jld* 5.

[33] The plaintiff's witnesses, PW2, PW4 and PW6 had verified the claims from Robert Bosch and the amount claimed by the plaintiff from the defendant.

[34] For the reasons stated above, we allow this appeal with costs of RM50,000 for here and below. We also make the following orders:

Prayer 1, which is for the sum of RM3,196,841.71 is allowed;

Prayer 2 allowed with a variation that the interest rate applicable is 5% instead of 8%pa.

Appeal allowed with costs of RM50,000 here and below.

Reported by Dzulqarnain Ab Fatar